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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-717

ALEXANDER J. ANTOINE and IRENE F. ANTOINE, his wife,
Appellants,

v.

THE STATE OF WASHINGTON,
Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants, who are Indians,[1] were convicted of violating game laws of the State of Washington. They appeal from the Judgment of the Supreme Court of the State of Washington, entered July 12, 1973, confirming the judgment of conviction in the Superior Court for Ferry County, State of Washington, Cause No. 4859, signed and entered by the Honorable Richard J. Ennis on May 16, 1972, and filed May 18, 1972.

OPINIONS BELOW

The opinion of the Washington State Supreme Court is reported at 82 Wn.2d 440, ... P.2d ..... (1973), and is

1. Appellant Alex Antoine is an enrolled member of the Confederated Tribes of the Colville Indian Reservation. His wife, Irene is a member of the Canadian branch of the Okanogan Band and is not enrolled in the United States.

reprinted as Appendix A. The Superior Court's findings, judgment and sentence are not reported, but are reprinted as Appendices B and C. The judgment appealed from (being the Remittitur of the State Supreme Court dated August 12, 1973) is reprinted as Appendix D.

JURISDICTION

Alexander Antoine, a Colville Indian, shot a deer on land which was formerly part of the Colville Indian Reservation. Mr. Antoine and his wife Irene were charged with violation of state laws which prohibit taking and possession of deer during closed seasons.

They were tried, convicted and sentenced to jail terms. A timely appeal was taken to the State Supreme Court. On July 12, 1973, that court affirmed and expanded the decision of the trial court by rendering a written opinion upholding the lower court's decision.[2]

On August 12, 1973, the Washington Court issued its Remittitur[3] to the trial court, which is the judgment enforcing its written opinion.[4]

On September 19, 1973, appellants filed in the Washington Supreme Court, a notice of appeal to the Supreme Court of the United States.[5]

Jurisdiction of the Supreme Court to review the judgment below by direct appeal is conferred by 28 U.S.C. § 1257(2) which reads in part:

2. App. A.
3. App. D
4. RCW 2.04.170, Supreme Court Administrative Rules, Rule 15.
5. App. E.

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Metlakatla* v. *Egan*, 369 U.S. 45 (1962);[6] *United States* v. *Winans*, 198 U.S. 371 (1905); *Tulee* v. *Washington*, 315 U.S. 681 (1942).

STATUTES AND FEDERAL LAWS INVOLVED

United States Constitution, Article VI, clause 2 (Supremacy Clause).[7]

United States Constitution, Article I, section 8, clause 3 (Indian Commerce Clause).[8]

25 U.S.C. § 2.[9]

Agreement of 1891.[10]

6. *Metlakatla* is analogous to the present case. There, the Indians claimed that they were immune from state wildlife laws as applied to them on the grounds that such laws were repugnant to the Supremacy Clause, federal statutes and secretarial orders. Here, appellants allege that state law is repugnant to the Supremacy Clause, federal statutes and executive orders. *Metlakatla* held that appeal was the appropriate remedy. *Metlakatla*, *supra*, p. 50.

7. App. G., p. G-1.

8. App. G., p. G-1.

9. App. G., p. G-2.

10. App. F. National Archives Document No. 21167—Indian Office Inclos. No. 8-1891.

Act of June 21, 1906, 34 Stat. 325, at 377 (3 Kapp. 193, at 245).[11]

Executive Order of July 2, 1872 (1 Kapp. 195).[12]

Revised Code of Washington, Section 77.16.020[13] and Section 77.16.030.[14]

QUESTIONS PRESENTED

1. Where an Indian tribe cedes lands of its reservation to the United States by agreement, may the federal government reserve hunting rights for the Tribe in the ceded area?

2. When former Indian lands become part of a state, does the state take the land subject to rights previously reserved on such lands for Indians by the United States?

3. Did the federal government by the agreement of 1891 and the act of June 21, 1906, reserve hunting rights to the Colville Indians on their former reservation?

4. Where the United States has declared that hunting rights of the Colville Indians "in common with all other persons . . . shall not be taken away or in any wise abridged," may the State of Washington abridge, impair or regulate such rights?[15]

11. App. G., p. G-1.
12. App. G., p. G-1.
13. App. G., p. G-2.
14. App. G., p. G-3.
15. Within these general questions, are, of course, many subsidiary questions which deal with the specifics of the case: e.g., are sections 020 and 030 of Chapter 77.16, Revised, repugnant to the Executive Order, 1891 Agreement, and statute of 1906 involved in the case? What are the proper rules of interpretation, intent and construction to be applied to post-1871 federal actions, be they executive orders, agreements, statutes, secretarial orders, etc.? Did the end of the power to make treaties with Indians in 1871 limit the federal government's power and authority in dealing with its Indian wards thereafter?

STATEMENT OF THE CASE

The Colville Confederated Tribes comprise eleven separate tribes and bands of Indians who formerly occupied large areas of Eastern Washington. They were placed on the Colville Indian Reservation in 1872 by Executive Order of the President.[16] The tribes are recognized by the United States Government, Bureau of Indian Affairs and are governed by a Constitution and By-Laws approved by the Secretary of the Interior on December 26, 1938. Of the 5,340 enrolled members of the tribes, approximately half live on the Colville Indian Reservation or its environs. Alexander Antoine is an enrolled member of the Tribes.[17]

On September 11, 1971, Mr. Antoine and his wife, Irene,[18] shot and killed a deer in what is now Ferry County, Washington. On that date, the hunting season for deer in that particular area was closed.[19] The area in which the deer was shot, however, was within the boundaries of the original Colville Indian Reservation as established by the 1872 Executive Order.[20]

This land had been ceded back to the United States Government by the various bands and tribes of the Colville Confederation by agreement with the United States in 1891.[21] That agreement provided in part:

> It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limita-

16. Executive Order of July 2, 1872; (1 Kapp. 195), App. G., p. G-1.
17. R. 51.
18. Irene Antoine is also an Indian, but not an enrolled member of the Confederated Tribes.
19. R. 50.
20. R. 50.
21. App. F.

> tions prescribed by law, to taxation for any purpose, national, state or municipal; that said Indians shall enjoy without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the *right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged*.[22]

Mr. Antoine and his wife were cited by a State of Washington game protector for shooting and possessing deer in violation of the Washington State game laws.[23]

They were tried in Ferry County District Court in October 18, 1971 and found guilty as charged in an opinion filed by the District Court Judge on November 1, 1971.[24]

Pursuant to state law, Alex Antoine and his wife filed a timely Notice of Appeal to the Superior Court for trial *de novo*.[25]

Trial was held January 14, 1973 before the Honorable Richard J. Ennis, resident judge of the judicial district composed of Lincoln County, State of Washington, sitting *pro tem* for the Ferry County Superior Court, Republic, Washington.[26]

After trial on stipulated facts,[27] appellants' conviction for hunting and possession of deer out of season was upheld by the Superior Court, holding that:

22. App. F., p. F-4.
23. RCW 77.16.020 and 77.16.030. See App. G herein.
24. District courts are county courts of limited jurisdiction in the State of Washington. See RCW 3.66.060.
25. Superior courts are state courts of general jurisdiction (RCW 2.08-.020) to which appeals from districts courts may be made.
26. R. 5.
27. R. 7-9.

> These Indians are bound by the 1891 Agreement which gave the Indians the right to hunt and fish in common with all others. Now, this simply means that the defendant is bound by the state conservation laws as all others are bound.[28]

Judgment and sentence were filed May 19, 1972, finding Mr. Antoine guilty as charged, sentencing him to 30 days, 25 suspended, and his wife, Irene, to 30 days suspended, with one year probation.[29]

Appeal was taken to the Supreme Court of the State of Washington which rendered its Opinion on July 12, 1973, the Court holding that "the Agreement before us . . . is not the supreme law of the land.[30] and ". . . the federal government was not authorized to curtail the state's right to exercise its police power, . . ."[31]

The Remittitur of the State Supreme Court was filed August 12, 1973, and is hereby appealed from.[32]

HOW THE FEDERAL QUESTION WAS PRESENTED

Superior Court Trial

At all times in this proceeding, appellants have maintained that the state game laws as applied to them were repugnant to federal law. Thus at trial, appellants maintained that they were hunting within the limits of the agreement with the federal government.[33] In appellants' trial brief it was noted that hunting and fishing rights had been reserved and secured by establishment of the reserva-

28. R. 24-25.
29. R. 53-54.
30. 82 Wn.2d 440, at 451. App. A., p. A-13.
31. *Op. cit.*, at 443. App. A., p. A-4
32. App. D.
33. R. 24.

tion and that such rights had not been impaired or abrogated by any subsequent agreements or events.[34]

At the close of trial, the trial judge stated that the Indians were bound by the 1891 agreement but that it only meant that they were bound by all state conservation laws ". . . as all others are bound."[35]

This conclusion was reiterated in the court's formal Findings of Fact and Conclusions of Law, which stated:

> The Colville Indians and defendant herein are bound by the 1891 agreement with the United States Government which gave the Indians the right to hunt and fish in common with all others. This means that defendant is bound by the state conservation laws as all others are bound.[36]

The court then held that defendants were guilty of violating state game laws.[37]

Appellants' Brief to the Washington Supreme Court

On appeal to the Washington State Supreme Court, through assignments of error in the brief,[38] and in written and oral argument, appellants renewed their position that the arrest and judgment violated their federally protected rights.

Appellants argued that hunting and fishing rights originally reserved by the 1872 executive order had not been abrogated by agreement, statute or act of Congress nor were they abrogated by the 1891 agreement or acts ratifying that agreement.[39] Appellants further argued that Indian rights guaranteed by the federal government were not to be impaired or abrogated by implication,[40] that federal action with regard to Indians were part of the supreme law of the land,[41] and that the Agreement of 1891 was to be construed liberally in favor of the Indians.[42]

34. R. 41-45.
35. R. 25.
36. R. 51.
37. R. 52.
38. R. 57, Br. of Appellants, p. 5-6.

In their reply brief, appellants renewed their position that federal jurisdiction over Indian affairs was exclusive and precluded any notion of residual state powers.[43] Appellants further argued that once vested, hunting and fishing rights could not be terminated by implication but only by specific and explicit action of the Congress,[44] and that the terms and conditions upon which Indians would surrender and cede land to the federal government was a matter to be determined primarily between the Indians and the United States Government under whose exclusive jurisdiction the Indians were at the time of the cession.[45]

The Opinion of the Washington Supreme Court

The Washington Supreme Court rejected all of the above contentions. It embraced the state's position that the federal government was ". . . not authorized to curtail the state's right to exercise its police power, . . ."[46] It held that there was ". . . merit in the theory which the state does

39. R. 57, Br. of Appellants, p. 11-16.
40. R. 57, Br. of Appellants, p. 16.
41. R. 57, Br. of Appellants, p. 17.
42. R. 57, Br. of Appellants, p. 16-17.
43. R. 59, Reply Br. of Appellants, p. 2 and 4.
44. R. 59, Reply Br. of Appellants, p. 3-4.
45. R. 59, Reply Br. of Appellants, p. 6.
46. App. A, p. A-4.

advance . . .",[47] that the federal government ". . . had no authority to and did not purport to act on behalf of the state or to commit it to release a portion of its sovereign powers . . .",[48] and that acts of the federal government could not "nullify" the "functioning and jurisdiction" of the state.[49] It further held that the state was not a party to the 1891 agreement and thus its powers were not affected thereby.[50]

The court also found that the words "in common with" were "not without significance"[51] and from this implied that no special rights were guaranteed to the Indians.

The court then specifically held that no special hunting and fishing rights were secured to the Indians by the 1891 agreement or Act of June 21, 1906.

> Such an intent (to secure special hunting and fishing rights) cannot be found, either expressed or implied, in the statutes and is not manifested in the agreement.[52]
>
> . . . it was not the intent to guarantee to the Indians immunity from the laws of the state when hunting off the reservation.[53]

Finally the court held that the agreement preserves ". . . to the state direct exercise of its police power in an area properly within its jurisdiction."[54]

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47. App. A, p. A-4.
48. App. A, p. A-10.
49. App. A, p. A-16.
50. App. A, p. A-6-7 This of course constitutes a finding that no special rights were reserved by the Indians.
51. App. A, p. A-11.
52. App. A, p. A-12.
53. App. A, p. A-12.
54. App. A, p. A-17.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This case is of importance not only to appellants but to the 500 or more Colville families who live on or near the reservation, many of whom depend upon game for a food source. The State Supreme Court's decision destroys vested hunting rights on former reservation lands of these Indians. It throws a cloud on the legality of one of the agreed on terms of the 1891 Cession Agreement and thus the entire legality of the Cession itself.

The principles announced by the court have great significance in the continuing federal-state relationship affecting Indian affairs in the state of Washington. If allowed to stand, they will seriously affect the ability of the federal government to carry out its trust responsibility with regard to its Indian wards in the state.[55]

The principle announced by the state court relegates all federal actions, be they Executive orders, agreements, statutes, etc., undertaken after the end of the treaty-making power in 1871, to a second class position in the field of Indian law. The principles enunciated allow the state court to construe and interpret such federal law according to rules and guidelines not heretofore applicable to Indian statutes and agreements.

Those rules and guidelines seriously errode the protection of Indian rights under federal law.

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55. Virtually every one of the 30-plus tribes and bands in the state of Washington trace their current rights and guarantees to post-1871 federal actions or agreements. For example, the Makah Indian Reservation was established by Executive order in 1872, 1 Kapp. 917; the Lummi Indian Reservation was established by Executive Order in 1872, 1 Kapp. 917; the Moses Band of Indians and some of the Colville Bands relinquished their previous reservation by agreement in 1883. (23 Stat. 79).

This conclusion can be best illustrated by a summary of appellants' case followed by the state court's response thereto.

Appellants' case was as follows.

1. *Establishment of an Indian reservation vests hunting rights in an Indian tribe.*

It has long been the rule that rights granted or reserved to Indians by the establishment of a reservation by Executive order are as secure and as entitled to paramount protection as are rights reserved by treaty. *Spalding v. Chandler*, 160 U.S. 394 (1896), and *Federal Indian Law*, p. 614-616.[56]

The instrument establishing the reservation need not specifically enumerate hunting rights for such rights to exist. Where no specific mention of the right to hunt and fish was made, ". . . such a reservation was not necessary to preserve the right on land reserved or retained in Indian ownership. The right to hunt and fish was part of the larger rights possessed by the Indians in the lands used and occupied by them. Such right, . . . remains in them unless granted away." *Federal Indian Law*, 496-498, citing Op. Act. Sol. M.28107, June 30, 1936. Thus it has been held that where land is merely set aside for Indian use and occupancy, there being no specific mention of hunting and fishing rights, those rights nevertheless are included in the reservation. *Menominee v. United States*, 391 U.S. 404 (1967).

56. *Federal Indian Law*, 1958, is a revision of the *Handbook of Federal Indian Law*, prepared by the office of the United States Solicitor under the editorial direction of Felix S. Cohen, Assistant Solicitor, and first printed in 1940. References in this brief are to the 1966 reprinting by the Association on American Indian Affairs, Inc. of the 1958 revision of the *Handbook*.

Thus it is clear that establishment of the Colville Reservation by the Executive Order of 1872 vested hunting rights in the Colville Confederated Tribes.

2. *A state has no authority over hunting rights on an Indian reservation.*

The nature and scope of the Indian rights to wildlife on a reservation is nearly absolute *vis-a-vis* the state. A state has no authority to interfere with hunting on federal lands. *Hunt v. United States*, 178 U.S. 96 (1928). Wildlife on a reservation belongs to the Indians as their property. *Mason v. Sams*, 5 F.2d 255 (W.D. Wash., 1955); *Pioneer Packing v. Winslow*, 159 Wash. 655 (1930). Within a reservation, Indians are exempt from state conservation regulations. *Moore v. United States*, 157 F.2d 760 (9th Cir., 1956), *cert. denied*, 308 U.S. 827 (1957). And, of course, it is a federal crime to hunt on Indian lands without permission of the Indian owners. 18 U.S.C. § 1165.

Clearly, establishment of the Colville Reservation vested substantial and far-reaching hunting rights in the Colville Indians, over which the State of Washington had no control or authority.[57]

3. *Vested hunting and fishing rights continue until and unless explicitly abrogated by the Congress.*

Hunting rights vested by the establishment of a reservation are not to be lightly terminated. Such rights continue

57. At the time that the rights vested, *i.e.*, 1872, Washington was not yet a state. However the subsequent fact of statehood does not change the authority or control of the state. A state must accept statehood subject to whatever outstanding rights and guarantees exist at the time of statehood. See *United States v. Winans*, 198 U.S. 371, at 382-84 (1905), see also, *Coyle v. Smith*, 321 U.S. 559, 570 (1911) and *Johnson v. Geralds*, 234 U.S. 422, 438-40 (1914); *Metlakatla v. Egan*, 369 U.S. 45, 59 (1962).

even after the termination of the reservation where no specific mention is made of the rights in the article of termination. *Menominee v. United States, supra.*[58]

More generally, the court has rejected attempts to find vested Indian rights terminated by implication. *Choate v. Trapp*, 224 U.S. 665 (1912); *Mattz v. Arnett*, ... U.S. ...., 37 L. Ed. 2d 92 (1973).

4. *Colville hunting rights were preserved by the Agreement of 1891 and the Act of June 21, 1906.*

Applying well-known Indian law principles, it is clear that the hunting rights vested in the tribe were preserved by the Agreement of 1891 and the Act of June 21, 1906.

These principles are as follows:

a. *Federal laws relating to Indians are superior to and supreme with regard to state law.*[59]

The Washington court itself has noted that:

> The historical circumstances, which made exclusive federal jurisdiction over Indians necessary, preclude any notion of residual state powers.

State ex rel. Adams v. Superior Court, 57 Wn.2d 181, 185 (1960).

And this court has held that:

> The whole intercourse between the United States and this (Indian) nation is, by our Constitution and laws, vested in the government of the United States.

58. It has even been held that in some circumstances the Congress cannot terminate vested rights at all, at least not without adequate compensation. *Choate v. Trapp*, 224 U.S. 665 (1912).

59. U.S. Const., art. 6, cl. 2 (Supremacy Clause) and art. 1, § 8, cl. 3 (Indian Commerce Clause).

Worcester v. State of Georgia, 6 Pet. 515 (1832).[60] Federal power over Indians is so extensive that ". . . one is justified in characterizing such federal power as plenary." *Federal Indian Law*, 24.

b. *Indian agreements, treaties, statutes and laws are to be liberally construed to protect the rights of Indians with all ambiguities resolved in the Indians' favor.*

This has been a primary rule of construction for courts when dealing with Indian rights. *Winters v. United States*, 107 U.S. 564 (1907). See also, *Alaska Pacific Fisheries v. United States*, 248 U.S. 278 (1918).

This court has held that:

> The parties were not on an equal footing and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the laws.

Choctaw Nation v. United States, 119 U.S. 1, 28 (1896).

Had the State Supreme Court followed the principles outlined above, only one conclusion would have been possible: the federal government and the Indians intended that vested hunting rights were to be preserved by the agreement of cession and this preservation was to be binding on the State of Washington.

The existence of the rights not being in question, the only issue for the court to decide was whether *any* state

60. See also, *Williams v. Lee*, 358 U.S. 218 (1959). The general powers of the federal government over Indians have also been noted to derive from the Indian Commerce Clause and from the necessity of giving uniform protection to dependent people. See *Perrin v. United States*, 232 U.S. 478; *United States v. Kagama*, 118 U.S. 275; *Williams v. Lee*, *supra*, at 219, FN 4.

regulation or interference *at all* was allowed or whether some regulation as "necessary for conservation" was possible.[61] To decide that, the court would have had to construe the phrase "in common with," which had been held by the trial court to mean that the Indians were bound by the conservation laws the same as all others were bound. It would also have had to construe the language "shall not be taken away or in any wise abridged."[62]

The court, however, did not follow the analysis outlined above. Surprisingly, it rejected the concept of the supremacy of federal law in the area of Indian affairs and the rules of interpretation noted.

Instead it held that the federal government was "not authorized" to preserve Indian rights in the ceded area.[63] It held that there was merit in the state's theory that the federal government "had no authority" to act for the state or permit the state to release a portion of its sovereign powers.[64] It held that the federal government could not "nullify" the "functioning and jurisdiction" of the state.[65] It held that since the state was not a "party" to the Agree-

61. *Puyallup v. Department of Game*, 391 U.S. 392 (1968).

62. Appellants argued that the language "shall not be taken away or in any wise abridged" took this case out of the area of application of the *Puyallup* decision which involved treaty language which did not have such limiting words. Appellants argued also, however, in the alternative, that even if *Puyallup did apply*, the particular regulations in question here violated appellants' federally protected rights under the guidelines laid down by decisions subsequent to Puyallup. See e.g. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Ore. 1969), holding that a state must show separate consideration for Indian rights and meet the burden of showing that they are necessary for conservation. Accord, *Department of Game v. Puyallup Tribe*, 80 Wn.2d 561 (1972).

63. App. A, p. A-4.

64. App. A, p. A-10.

65. App. A, p. A-16.

ment, its powers over game could not be affected thereby.[66] And it held that the federal government had no "intent" to preserve special rights for the Indians.[67]

To hold that there was no intent in the Agreement to preserve Indian rights violates the tenants of construction of Indian agreements noted above.

To hold that no agreement could be made concerning Indian rights over wildlife on former lands because the state was not a party to the agreement, violates settled law. *Choate v. Trapp*, 224 U.S. 665 (1912).

To hold that the federal government had no authority to grant the request of the Indians that they retain part of their property rights, contradicts the concept of plenary authority of the Congress over Indian affairs. It ignores the fact that the land and hunting rights were under the absolute control of the federal government and Indians at the time of the Agreement and thus were subject to agreement by those two parties.

To hold that different rules of interpretation, and different concepts of federal authority apply to "treaties" made before 1871 than to agreements, statutes, etc. made after that time, violates not only rulings of this court, but the state court's own ruling as well.

In *State ex rel. Adams v. Superior Court*, 57 Wn.2d 181, 183 (1960), the court held that the 1871 Act[68] ". . . did not affect the federal government's exclusive jurisdiction over

66. App. A, p. A-5-7.

67. App. A, p. A-12.

68. The act terminating the right of the Senate to deal with the Indians by treaty. Act of March 3, 1871 (16 Stat. 544, at 566, 25 U.S.C. 71).

the Indian tribes, but was only a decision to govern its Indian wards by Congressional enactment rather than by treaty . . . The historical circumstances, which made exclusive federal jurisdiction over the Indians necessary preclude any notion of residual state powers."

Finally, to hold that the federal government had no authority under the Indian Commerce power to preserve Indian hunting rights as hunting is not commerce, is wrong.[69] In so holding the court again makes the mistake of citing cases from areas of the law inapplicable to an Indian situation.[70] The correct rule is that:

> The Congressional power over commerce with the Indian tribes plus the treaty-making power is much broader than the power over commerce between states.

Federal Indian Law, p. 27.

This power is a ". . . plenary power granted or implied in article I, section 8, clause 3 of the Constitution to regulate tribal activities and thereby the activities of individual members." *Federal Indian Law*, p. 27. It is ". . . a power as broad and as free from restrictions as that to regulate commerce with foreign nations." *U.S. v. 43 Gallons of Whiskey*, 93 U.S. 188, 194 (1876).

CONCLUSION

Taken as a whole, the State Supreme Court's opinion amounts to a holding that the federal government had neither the authority nor intent to reserve hunting rights for the Colville Tribe on reservation land to be ceded to the federal government. It amounts to a holding that, al-

69. App. A, p. A-16.

70. i.e. *Geer v. Connecticut*, 161 U.S. 519 (1896).

though it would appear on the face of the cession agreement that the Indians intended to reserve hunting rights, the state subsequently took jurisdiction over those lands without that reservation of rights. The opinion further constitutes a holding that although the Colville Indians ceded their reservation lands, reserving a right to hunt that would not be "taken away or in any wise abridged," in fact the State of Washington may abridge, take away or regulate those rights at will.

To come to such conclusions, the state court violated rules of interpretation and construction concerning Indian agreements as outlined by the United States Supreme Court. In so doing it effectively denied to the federal government its authority over Indian affairs. Its holding, if allowed to stand, would appear to effectively block an attempt by an Indian tribe to cede its reservation lands to the federal government provided it retained hunting and fishing rights on that land.

The state court applied the technical rules of municipal jurisprudence in construing the federal agreement and the federal statutes dealing with the Colvilles.[71]

This it may not do as this court has held that different rules are to apply for the protection of Indians. *Winters v. United States*, 107 U.S. 564 (1907); *Choctaw v. United States*, 119 U.S. 1 (1896).

71. See e.g. App. A, p. A-5 (Contracts), p. A-14 (Conflicts Between Federal and State Powers), p. A-16 (Interstate Commerce Powers), p. A-17 (Conflicts Between Federal and State Regulation).

A promise was made to the Indians by the federal government in return for their land. That promise should be kept.

Respectfully submitted,

ZIONTZ, PIRTLE, MORISSET & ERNSTOFF

By MASON D. MORISSET

Attorneys for Appellants

October, 1973

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Respondent,* v. ALEXANDER J. ANTOINE, and IRENE F. ANTOINE, his wife, *Appellants.*	No. 42420 EN BANC Filed July 12, 1973

The appellants were charged in superior court with the offenses of hunting during closed season (RCW 77.16.020) and possession of deer during closed season (RCW 77.16.-030). The offenses occurred on unallotted nonIndian land in what was once the north half of the Colville Indian Reservation. By way of defense, the appellants asserted that they were not subject to the state's game protection laws, immunity from such laws having allegedly been promised them by the United States government under the terms of an agreement signed by agents of the government and by members of their Indian tribe in 1891. The trial court held that the agreement was not intended to afford such immunity from state laws, and entered judgment and sentence, from which this appeal has been taken.

The appellant husband is an enrolled member of the Confederated Tribes of the Colville Reservation, and it is not questioned that he and his wife are beneficiaries of the agreement in question, which was executed when the Indians residing on the reservation, for a stated price, ceded their right of occupancy and use of the northern half of

the reservation to the United States, owner of the fee.[1] Under the terms of the agreement certain lands in the ceded portion were to be allotted to Indians then residing on the northern half. A school and a millsite and buildings were to be provided on the ceded lands.

Article 6 of the agreement stated:

> It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limitations prescribed by law, to taxation for any purpose, national, state or municipal;[2] that said Indians shall enjoy without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.

1. The Colville Reservation was created by executive order on July 2, 1872. 1 Kappler 915-916.

> It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation of this government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated.

Spalding v. *Chandler*, 160 U.S. 394, 402, 40 L. Ed. 469, 16 S. Ct. 360 (1896).

2. Const. art. 26, Compact with the United States, provided that the state should impose no taxes on lands or property belonging to the United States, with the proviso:

> That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

It is upon the final clause of this article that the appellants place their reliance. It is their theory that, before the northern half of the reservation was ceded under the terms of this agreement, their ancestors had the exclusive, absolute, and unrestricted right to hunt and fish upon the entire reservation, and that it was this right which the agreement was intended to preserve. The appellants do not claim to have succeeded to the interest of an allotment Indian, but it is their assumption that this provision was intended to guarantee to all the Indians on the reservation —and not just to the allotment Indians—the right to hunt on the ceded half. The state does not dispute this interpretation.

We think a plausible argument could be made that this clause, like all the other clauses in this article, was intended to guarantee to the allotment Indians the right to hunt and fish upon the southern half of the reservation, inasmuch as they would no longer be living on the reservation proper and might have their right to hunt there questioned, if it was not clarified in the agreement. Also, since it was contemplated that the unallotted lands in the ceded portion of the reservation would be opened to settlement,[3] and it was reasonably to be foreseen that the settlers might fence their land and exclude the Indians and others from

3. "By the act of July 1, 1892, c. 140, 27 Stat. 62, a specified tract or portion of the reservation—with certain exceptions—was 'vacated and restored to the public domain' and it was provided that this tract should be open to settlement and entry by the proclamation of the President and should be disposed of under the general laws applicable to the disposition of public lands in the State of Washington. The exceptions were made by Congress in order to care for the Indians residing on that portion of the reservation." *United States* v. *Pelican*, 232 U.S. 442, 445, 58 L. Ed. 676, 34 S. Ct. 396 (1914).

hunting thereon, the allotment Indians might have no place to hunt, outside their individual allotments, unless they could hunt upon the reservation.

However, since the state has not seen fit to adopt or argue this theory and since we also find merit in the theory which the state does advance, we do not rest our decision here upon that possible interpretation of the agreement. It is the state's position that the federal government was not authorized to curtail the state's right to exercise its police power, in this contractual agreement, and that it did not purport to do so.

The appellants, on the other hand, while acknowledging that the instrument in question is in fact a contract and that the executive branch was not authorized to make treaties with the Indians at the time the agreement was entered into,[4] nevertheless insist that the agreement should be given the full force and effect of a treaty—in other words, that it constitutes the supreme law of the land—and further maintain that the plain import of its words is that the right to hunt and fish on the ceded and unallotted lands should never be subject to state regulation.

We cannot agree with the proposition that there is no significant difference between a contract and a treaty. A treaty is defined in Black's Law Dictionary (4th rev. ed. 1968), citing *Edye v. Robertson*, 112 U.S. 580, 28 L. Ed. 798, 5 S. Ct. 247 (1884); *Ex parte Ortiz*, 100 F. 955 (C.C.D., Minn. 1900); and *Charlton v. Kelly*, 229 U.S. 447,

4. *See* Act of March 3, 1871, ch. 120, Rev. Stat. § 2079: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

57 L. Ed. 1274, 33 S. Ct. 945, 46 L.R.A. (n.s.) 397 (1912), as follows:

> An agreement, league, or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns or the supreme power of each state.

A treaty must be entered into with the advice and consent of the senate and must be ratified by two-thirds of the senators present. U.S. Const. art. 2, § 2. Once ratified, a treaty becomes the supreme law of the land. U.S. Const. art. 6. A treaty which deals with a matter of national and international concern may contain provisions, binding upon the states, which the Congress, without such treaty, would have no power to enact. *Missouri v. Holland*, 252 U.S. 416, 64 L. Ed. 641, 40 S. Ct. 382 (1920). States are forbidden to enter into treaties. U.S. Const. art. 1, § 10.

A contract, on the other hand, can be enforced only against those party to it. *McIntyre v. Johnson*, 66 Wash. 567, 120 P. 92 (1912). *See* 17 Am. Jur.2d *Contracts* §§ 1, 15 (1964). A state is bound by contracts executed in its behalf by its duly authorized agents, provided the contract does not contravene the constitution and does not divest the state of its essential attributes of sovereignty or its governmental powers. 81 C.J.S. *States* §§ 112-13 (1953). 49 Am. Jur. *States, Territories, and Dependencies* § 62 (1943). But before a contract liability can be imposed upon a state, there must be a contractual obligation on its part.

The United States, as a body politic, and as an incident of its sovereignty, may enter into contracts, express or implied, appropriate to the just exercise of its constitutional

powers, if not prohibited by law, even though there is no special statute authorizing the government to contract. 91 C.J.S. *United States* §§ 81-82 (1955).

There is no argument by the state that the contract between the United States and the Indians of the Confederated Tribes was made without authority. The appellants, on the other hand, do not suggest that the state was a party to the contract or that the agents of the federal government who negotiated and signed the contract were authorized to act on behalf of the state.

Did the parties nevertheless intend that the state should be considered a party to this agreement?

Looking to the terms of the agreement, we find that the promises made by the federal government, setting aside for the moment the clause relating to hunting and fishing rights, were all undertakings which it was within the power of the federal government to perform. These included the payment of a stated sum for the ceded land, the allotment of certain lands to the Indians living on the north half of the reservation, the setting aside of sites and the building and maintenance of schools and other structures on the ceded land, the guarantee of water rights on the allotted land, and the exemption from taxation of the allotted land "within the limitations prescribed by law."

The latter provision is the only one in the agreement which makes any reference to state or local government, and the provision itself is in harmony with article 26 of the constitution of the state of Washington. In making this promise, then, the United States did not purport to invade any reserved power of the state but merely set forth in the

agreement a right which was already guaranteed under the state constitution.

Thus, nowhere in the agreement did the federal government purport to act on behalf of the state of Washington or to cede any of its jurisdiction. The state itself could not have lawfully made such a cession had it been a party to the agreement. Yet the appellants earnestly contend that the court must read into the language promising the continuation of hunting and fishing rights a promise that the state of Washington would not exercise its right, under the police power, to regulate hunting upon those ceded lands which were to become a part of the public domain.

It was implicitly recognized by the United States Supreme Court in *United States v. Pelican*, 232 U.S. 442, 58 L. ed. 676, 34 S. Ct. 396 (1914), that lands within the public domain which are not subject to the exclusive jurisdiction of the federal government are subject to the jurisdiction of the state. In that case, the defendant, charged with a crime under federal law, took the position that he was not subject to federal jurisdiction because the crime was not committed on the Colville reservation but rather was committed on allotted lands located outside the diminished reservation.

In holding that the allotted lands were Indian country and therefore subject to federal jurisdiction, the Supreme Court took cognizance of the fact that Congress in the act of July 1, 1892, c. 140, 27 Stat. 62, vacated and restored to the public domain a certain portion of the reservation (that portion upon which the offenses charged in this action occurred), to be disposed of under the general laws applicable to the disposition of public lands in the state of

Washington.[5] The court also recognized that upon the expiration of the trust period, the allottees were, according to the terms of the act of Congress, to become subject to and to have the benefit of the laws, both civil and criminal, of the state.[6]

It is evident that Congress was aware that the ceded and unallotted lands when opened for settlement, if not before, would come under the jurisdiction of the state. In fact, the appellants do not question the state's power to regulate the taking of game on the land in question; they claim only to be exempt from the operation of the game laws by virtue of the terms of the agreement of 1891. It is their theory that the rights promised them under the agreement must include immunity from state regulation, else they were promised nothing which they would not have had without the agreement.

5. *See also State ex rel. Adams v. Superior Court*, 57 Wn.2d 181, 356 P.2d 985 (1960). Another situation involving the question of federal jurisdiction was before the court in *Ryan v. State*, 188 Wash. 115, 61 P.2d 1276 (1936), where we held that the federal government can secure exclusive juridiction over lands purchased within a state only if the state cedes such jurisdiction pursuant to article 1, section 8 of the constitution of the United States, providing that such jurisdiction can be ceded if the land is to be used for certain enumerated purposes. Lands set aside by the federal government for Indian reservations, either through treaty or by executive order, are also under the jurisdiction of the United States by reason of the power of the federal government to regulate Indian affairs. *See* 41 Am. Jur.2d *Indians* § 50 (1968). That power appears not to have been granted by any express provision of the constitution, but has never been denied.

6. *See Matter of Heff*, 197 U.S. 488, 509, 49 L. Ed. 848, 25 S. Ct. 506 (1905), where the court said: "We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control thus created cannot be set aside at the instance of the Government without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

As stated before, the appellants assert that, before the cession of the northern half of the reservation, they had the exclusive right to hunt thereon, unconstrained by state game regulations, and that it was the intent of the agreement to preserve this right on the ceded land. They acknowledge that the hunting rights on the reservation were subject to federal regulation at the time of the treaty and declare that they are subject to such regulation off the reservation, although they cite no legal authority for this proposition.[7]

Counsel also conceded in oral argument that the present owners of land in the northern half of the reservation have the right to fence their land and exclude hunters. Nevertheless they maintain that state regulation of the right to hunt is an abridgment of that right, within the meaning of the language as it was used in the contract.

According to the appellants' theory, then, the party who executed the contract—the United States—has the right to abridge their hunting rights by regulating them, and its successors in interest have a right to abridge them by excluding hunters from their land; but the state, which was not a party to the agreement and authorized no promise to be made on its behalf, cannot exercise its power and duty to protect its game, because that would amount to an unauthorized abridgment.

7. *See* 35 Am. Jur. 2d *Fish & Game* § 32 (1967), stating the general rule to be that the federal government has no power, aside from the power to enact statutes to carry out treaties respecting migratory birds (*Missouri v. Holland*, 252 U.S. 416, 64 L. Ed. 641, 40 S. Ct. 382 (1920)), to prescribe regulations for the protection of fish and game while within the boundaries of a state. In *Hunt v. United States*, 278 U.S. 96, 73 L. Ed. 200, 49 S. Ct. 38 (1928), however, it was held that the United Staes might exercise the proprietary right, on its own property, to kill game out of season for the purpose of protecting its game reserve.

We think that if it was contemplated that regulation of hunting rights would constitute an abridgment of those rights, the federal government would have agreed to exempt the Indians' rights from regulation. But it is not contended that it did so either expressly or impliedly. On the other hand, if it was thought that state regulation but not federal regulation would constitute an abridgment, an express provision to that effect should have been inserted, but only after the consent of the state had been sought and obtained.

Since the parties admittedly contemplated that the Indians' hunting rights would remain subject to regulation, it follows that regulation is not ipso facto an abridgment. We think the reasonable understanding of the parties must have been that the United States, as proprietor of the land, would not abridge the Indians' hunting and fishing rights.

Taking into account the fact that the federal government had no authority to and did not purport to act on behalf of the state or to commit it to release a portion of its sovereign powers, and the additional fact that all other provisions of the agreement were of the kind which were appropriate to such an agreement and within the power of the parties to perform, we are led to conclude that the parties intended their contract to embrace only matters which were within their control.

Whether the intent was to guarantee to the allotment Indians the right to hunt on other ceded lands as long as the white man and other Indians were allowed to hunt there, and on the southern half of the reservation with their fellow Indians—a promise which the parties could fulfill—or whether it was the intent to guarantee to all the Indians

of the tribe the right to hunt upon the unallotted lands in the ceded half, we think the language "in common with all other persons" was not without significance. It was known that the government intended to open these lands to settlement, that this was its purpose in acquiring them. This meant that proprietary rights would be exercised, that the lands might be fenced and hunters excluded. Under these circumstances, it was a reasonable undertaking for the purchaser of the land to agree to see to it that, as long as it held the land and allowed others to hunt thereon, the members of the tribe also should be allowed to hunt there.

The theory that the language of this agreement was intended to preserve the hunting and fishing rights intact, just as they had existed prior to the cession of the lands, cannot be reconciled with the fact of cession of all the Indians' "rights, titles, claim and interest" in the lands and the appellants do not contend that the language was meant to limit those words of cession. Such an interpretation would place a heavy encumbrance upon the title of every settler or purchaser.

Significantly, we find in the statutes authorizing the allotment of lands (act of Feb. 8, 1887, ch. 119, 24 Stat. 388), appropriating money for the purchase of the Indians' rights (act of June 21, 1906, Pub. L. No. 59-258, ch. 3504, 34 Stat. 325), and opening the unallotted land for settlement (act of July 1, 1892, ch. 140, 27 Stat. 62), no reference to the reservation of hunting and fishing rights. Other provisions of the agreement can be found reflected in these statutes, but upon the question of hunting and fishing, the statutes are silent.

Are we to assume that, by omitting these provisions from the enabling statutes, the United States Congress intended

to disregard a contractual undertaking on the part of its duly authorized commissioners? Research reveals no clue to the omission, but we assume that the government of the United States acted in good faith and that, according to its understanding of the import of the terms, thery were not intended to encumber the titles of settlers and purchasers or to impose restrictions upon the exercise of the police power by the state. Rather, we assume, it was thought that the undertaking on the part of the government was that of a proprietor and that the agreement could be performed within the normal functioning of the executive department.

There is expressed in these statutes an intent that the settlers and purchasers of the unallotted lands should take the title to the land unencumbered by restrictions in favor of those who had formerly enjoyed the right to occupy and use the land. They also manifest an intent that the Indians to whom land was allotted should receive their patents in due course and become citizens of the state, subject to all of its laws and entitled to receive their benefits. It is not in harmony with this expressed intent to assume that the Congress intended at the same time to grant to those Indians and to the Indians remaining on the reservation an immunity from the state's game regulation laws, assuming that it was within its power to grant such immunity. Such an intent cannot be found, either express or implied, in the statutes and it is not manifested in the agreement.

We are of the opinion that the trial court correctly construed the agreement of 1891, and that it was not the intent to guarantee to the Indians immunity from the laws of the state when hunting off the reservation.

We have no quarrel with the appellants' authorities, interpreting and giving force to Indian treaties. Such treaties are binding upon the states under the supremacy clause. U.S. Const. art 6. As the United States Supreme Court said in *United States v. Winans*, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1905), a state takes jurisdiction over its territory, when it is admitted to statehood, subject to the provisions of treaties adopted for purposes appropriate to the objects for which the United States held the territory prior to statehood. The agreement before us in this case is not a treaty and it was not signed before statehood. It is not the supreme law of the land. The statutes enacted by Congress in implementation of this agreement, which are the supreme law if they are within the power of the Congress to enact, make no reference to the provision relied upon by the appellants.

Even though it is bound by the provisions of a treaty, a state is not denied the right to enforce against the Indians its reasonable regulations for the preservation of fish. *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1968). It would be anomalous indeed if the court were to hold that the state can be deprived of its power to regulate the taking of game through the execution of a contract to which it was not a party, but could not be so deprived by the execution of a treaty admittedly within the power of the federal government to sign, which is declared by the constitution to be the supreme law of the land. We do not, however, reach the question whether this can be done by contract, since it is our conclusion that it was not intended to be done in this case.

Our view of the proper interpretation of this agreement is in harmony with the principles which have guided the courts in deciding questions which involve an alleged conflict between the exercise of federal and state powers. The United States Supreme Court said in *South Carolina v. United States*, 199 U.S. 437, 448, 50 L. Ed. 261, 26 S. Ct. 110 (1905):

> We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty.

This principle was recognized by the Supreme Court in *Dick v. United States*, 208 U.S. 340, 52 L. Ed. 520, 28 S. Ct. 399 (1908), a case strongly relied upon by the appellants. There, the defendant was prosecuted under the federal laws prohibiting the introduction of intoxicating liquor into Indian country. The violation occurred on land which had been ceded by the Nez Perce Indians to the United States. Under the terms of the agreement, the lands ceded and allotted were to remain subject to the protection of the federal laws prohibiting the introduction of liquor into the Indian country. The court upheld the agreement.

Insofar as the opinion in that case reveals, the state of Idaho was not a party to the action. It was not contended that the federal laws were in conflict with or superseded state laws; rather the defense was that the federal govern-

ment did not have jurisdiction over this offense, because exclusive jurisdiction resided in the state. The court held, in the exercise of its constitutional power to regulate commerce with the Indians, the federal government might enforce an agreement of this kind for a reasonable period of time—in that case, 25 years. The court said:

> In determining the extent of the power of Congress to regulate commerce with the Indian tribes, we are confronted by certain principles that are deemed fundamental in our governmental system. One is that a State, upon its admission into the Union, is thereafter upon an equal footing with every other State and has full and complete jurisdiction over all persons and things within its limits, except as it may be restrained by the provisions of the Federal Constitution or by its own constitution. Another general principle, based on the express words of the Constitution, is that Congress has power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of any State within whose limits are Indian tribes. These fundamental principles are of equal dignity, and neither must be so enforced as to nullify or substantially impair the other. In regulating commerce with Indian tribes Congress must have regard to the general authority which the State has over all persons and things within its jurisdiction. So, the authority of the State cannot be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes.

208 U.S. at 353.

Inasmuch as no conflict between the agreement and existing state law was found in that case, the court found it possible to give effect to the agreement without infringing upon the jurisdiction of the state. The case differs from this in several important aspects. In the first place the question before the court was not one of interpretation, the language of the agreement being unambiguous and the

only question being, was it enforceable? The state was not a party to the action and did not claim that enforcement of the agreement would interfere with the exercise of its police power. Further, the agreement was made in the exercise of a constitutional power of the federal government—that of regulating commerce with the Indian tribes. That the hunting of game is not commerce has been long settled. *Geer v. Connecticut*, 161 U.S. 519, 40 L. Ed. 793, 16 S. Ct. 600 (1896). Another significant difference is that the duration of the agreement in that case was only 25 years, whereas here the agreement is not limited as to time. The reasonableness of the period of time covered by the agreement, as well as the absence of any conflict with state laws, were factors to which the court appears to have given substantial weight in sustaining it.

The statement of the court in *Dick* which is applicable here is that which is found in the quoted paragraph—that in performing their proper functions, each of the two governments, federal and state, must have regard to the proper functioning and jurisdiction of the other and that neither of these must be allowed to nullify the other.

It is a fundamental principle of which the court was undoubtedly aware in the *Dick* case, that the power of a state to govern man and things will not be lightly stricken down by implication, and an unexpressed purpose of Congress to set aside statutes of states regulating their internal affairs is not lightly to be inferred and ought not to be applied where the legislative command, read in the light of its history, remains ambiguous. The intention of Congress to exclude the states from exercising their reserved powers must be clearly manifested. If it is claimed that a federal act conflicts with a state act, it must be clear that the

federal provisions are inconsistent with those of the state in order to justify the thwarting of state regulation. *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 82 L. Ed. 3, 58 S. Ct. 87 (1937); *California v. Zook*, 336 U.S. 725, 93 L. Ed. 1005, 69 S. Ct. 841 (1949); 81 C.J.S. *States* § 7, pp. 886-87 (1953).

This rule applies, of course, where both the federal and state governments are acting within their proper jurisdiction and it applies to acts of Congress, the supreme law of the land. If these are the governing principles when the court is viewing laws of such dignity, they are all the more forceful where the court is asked to hold that the federal government, in a contract to which the state was not a party and to which it did not give its consent, has undertaken to bind the state to renounce one of the powers which it is bound to exercise for the common welfare.

We are convinced that our interpretation of the agreement of 1891 gives full effect to the proper objectives and intentions of the parties, while preserving to the state the right to exercise its police power in an area properly within its jurisdiction.

The judgment is affirmed.

We concur:

HALE, C. J.
FINLEY, J.
HAMILTON, J.
/s/ ROSELLINI, J.
STAFFORD, J.
BRACHTENBACH, J.

No. 42420

UTTER, J. (concurring in part)— I concur in that portion of the opinion which construes article 6 to guarantee allotment Indians the right to hunt and fish upon the southern half of the reservation.

/s/ UTTER, J.

I Concur
WRIGHT, J.

APPENDIX B

STATE OF WASHINGTON, *Plaintiff*, v. ALEXANDER J. ANTOINE, and IRENE F. ANTOINE, his wife, *Defendants*.	No. 4859 Findings of Fact and Conclusions of Law

THIS MATTER, having come on regularly before the undersigned judge, the court having heard the stipulation of counsel concerning the facts of the case, and having listened to oral arguments of Mr. Larry Coniff, Deputy Attorney General for the State of Washington, and Mr. Mason D. Morisset, general counsel for defendant herein, now makes the following

FINDINGS OF FACT

1. On September 1, 1971, defendant, Alexander Antoine, was engaged in the activity of hunting for deer in Ferry County, Washington, within the exterior boundaries of the original Colville Indian Reservation as established by the President of the United States by Executive Order in 1872.

2. On September 11, 1971, defendant, Alexander Antoine, did also have in his possession a game animal, to-wit: a deer.

3. At the time of such hunting and possession, *i.e.*, September 11, 1971, hunting season was closed for deer in this particular area within Ferry County.

4. Defendant, Alexander Antoine, is a duly-enrolled member of the Confederated Tribes of the Colville Reservation.

5. The action herein complained of, *i.e.*, hunting and possession of a deer in closed season, occurred outside the exterior boundary of the Colville Indian Reservation as it presently exists.

6. The land on which the deer was shot was non-trust, unallotted, non-Indian owned land.

7. In 1891 the United States entered into an agreement with the Confederated Tribes of the Colville Reservation, entered in this cause as defendant's Exhibit 4, which contains the following language in Article VI:

> ". . . the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged."

FROM THE FOREGOING, the court makes the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and subject matter of this action.

2. The Colville Indians and defendant herein are bound by the 1891 agreement with the United States Government which gave the Indians the right to hunt and fish in common with all others. This means that defendant is bound by the State conservation laws as all others are bound.

3. Having shot and been in possession of a deer during closed season, defendant is guilty of taking a deer out of season in violation of RCW 77.16.020 and guilty of unlawful possession of a deer in closed season in violation of RCW 77.16.030.

DONE IN OPEN COURT this 27th day of July, 1972.

/s/ RICHARD J. ENNIS
Judge

Presented by:

PROSECUTING ATTORNEY
FOR FERRY COUNTY
/s/ GRANVILLE EGAN

Copy Received and Approved
for Entry:
ATTORNEY GENERAL OF
STATE OF WASHINGTON
/s/ LARRY CONIFF
Deputy Attorney General

Copy Received and Notice of
Presentation Waived:
ZIONTZ, PIRTLE & MORISSET
/s/ MASON D. MORISSET
Attorneys for Defendants

APPENDIX C

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FERRY

STATE OF WASHINGTON, *Plaintiff,* v. ALEXANDER J. ANTOINE, and IRENE J. ANTOINE, his wife, *Defendants.*	No. 4859 Judgment and Sentence [Filed 5/18/72]

This matter coming on regularly for hearing before the undersigned on the 14th day of January 1972, the defendants Alexander and Irene Antoine, appearing in person and with their attorney Mason D. Morisset of Ziontz, Pirtle and Morisset of Seattle; the defendants having been charged with violations of RCW 77.16.020; 77.16.030; and RCW 77.16.050, committed 11 September 1971, and were tried in District Court No. 1, Ferry County, Washington, to all of which charges defendants pleaded Not Guilty in this Court after a prior finding of Guilty in the District Court: and Appeal having been made hereto, and Trial having been had in this Court, Witnesses having been sworn and evidence introduced by the State of Washington, and on behalf of the defendants, and argument having been made, and,

It APPEARING this Court found the defendants Guilty of violating RCW 77.16.020 and 77.16.030, and that, on the

motion of the State the charge of violating RCW 77.16.050, was dismissed and

It APPEARING that the District Court sentenced Alexander Antoine to 30 days with 25 days suspended, plus one year probation, and the defendant Irene Antoine 30 days, suspended, with one year probation, and

It APPEARING THAT each defendant personally, their attorney, Mason D. Morisset, and the Assistant Attorney General and the Prosecuting Attorney all have stipulated in writing filed in this Court that such sentence of the District Court was reasonable under the particular circumstances, and each would agree that the same sentence be the sentence of the Hon. Richard J. Ennis, the Trial Judge herein, and

It APPEARING that the defendants have waived their right to be present at the signing of the sentence in this case. NOW THEREFORE

It is hereby ORDERED, ADJUDGED and DECREED that the defendants Alexander J. Antoine and Irene F. Antoine is each guilty of violation RCW 77.16.020, (hunting during closed season), it is further

ORDERED, ADJUDGED and DECREED that the defendant Alexander J. Antoine shall be confined in the County jail of Ferry County for 30 days, with 25 days thereof suspended, and is placed on probation to this Court for a period of one year from the entry of this Judgment,

It is further ORDERED that the defendant Irene F. Antoine shall be confined in the Ferry County Jail for 30 days, suspended, and shall be placed on probation to this Court

for a period of one year from date of the filing of this Judgment.

During the period of their probation each defendant shall be under the custody of the Sheriff of Ferry County, and shall make such reports and obey such reasonable rules as he shall direct.

Done in open Court this 16th day of May, 1972.

/s/ RICHARD J. ENNIS
Judge

Presented by:

/s/ GRANVILLE EGAN
Prosecuting Attorney for Ferry County

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Respondent*, v. ALEXANDER J. ANTOINE, and IRENE J. ANTOINE, his wife, Appellants.	REMITTITUR No. 42420 Ferry County No. 4859

The State of Washington to: The Superior Court of the State of Washington in and for Ferry County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on July 12, 1973, became the final judgment of this court in the above entitled case on August 13, 1973. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows: No cost bill having been filed, costs are deemed waived.

cc. MR. MASON D. MORISSET
HONORABLE GRANVILLE EGAN
Reports Office

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 14th day of August, A.D. 1973.

WILLIAM M. LOWRY
Clerk of the Supreme Court,
State of Washington

[SEAL]

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ALEXANDER J. ANTOINE and IRENE J. ANTOINE, *Appellants*, v. STATE OF WASHINGTON, *Appellee*.	No. 42420 Notice of Appeal to the Supreme Court of the United States

1. Notice is hereby given that Alexander J. Antoine and Irene F. Antoine, his wife, appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Washington entered July 12, 1973; confirming the judgment of conviction of the Superior Court for Ferry County, Washington, Cause No. 4859, signed and entered by the Honorable Richard J. Ennis, on May 16, 1972 and filed May 18, 1972.

2. This appeal is taken pursuant to 28 U.S.C. §1257 (2).

ZIONTZ, PIRTLE, MORISSET & ERNSTOFF
By /s/ MASON D. MORISSET
Attorneys for Appellants

September 18, 1973

PROOF OF SERVICE

I, Ann C. Musman, a secretary in the office of Ziontz, Pirtle, Morisset & Ernstoff, depose and say that on the 18th day of September, 1973, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on appellee herein: State of Washington, by deposit-

ing a copy thereof addressed to the Attorney General of the State of Washington, Temple of Justice, Olympia, Washington 98501, Attorney of Record for appellee, upon Joseph L. Coniff, Assistant Attorney General, 600 N. Capitol Way, Olympia, Washington 98501, and Granville Egan, Esq., Prosecuting Attorney for Ferry County, P.O. Box 613, Republic, Washington 99166 in a United States Post Office mailbox in Seattle, King County, Washington, with first class postage prepaid in compliance with United States Supreme Court Rule No. 33(1). All parties required to be served herein have been served.

/s/ ANN C. MUSMAN

SUBSCRIBED AND SWORN to before me this 18th day of September, 1973.

/s/ MASON D. MORISSET

Notary Public in and for the State of Washington, residing at Bellevue

APPENDIX F

[National Archives Document 21167—Indian Office Inclos. No. 8—1891]

Articles of Agreement—made and entered into on the 9th day of May A.D. 1891 at the Colville Indian Reservation in the State of Washington by Mark A. Fullerton, W. H. H. Dufur and James F. Payne Commissioners on the part of The United States appointed for the purpose, and The Indians residing on said reservation.

Article 1

The said Colville Indians residing and having their homes on the said Colville Indian Reservation upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their right, titles, claim and interest in and to and over the following described tract of Country on the Colville Indian Reservation in the State of Washington, viz.

Beginning at a point on the Eastern boundary line of the Colville Indian Reservation where the township line between townships 34 & 35 North of Range 37 East of the Willamette Meridian if extended West would intersect the same, said point being in the middle of the Channel of the Columbia River, and running thence West parallel with the forty ninth (49) parallel of latitude to the Western boundary line of the said Colville Indian Reservation in the Okanogan River, thence North following the said Western boundary line to the said forty ninth (49) parallel of latitude, thence East along the said forty ninth (49) parallel of latitude to the North East corner of the said Colville Indian Reservation, thence South following the Eastern boundary of said reservation to the place of beginning con-

taining by estimation one million five hundred thousand acres, the same being a portion of the Colville Indian Reservation created by Executive order dated April 9th 1872.

Article 2

Each and every Indian now residing upon the portion of the Colville Indian Reservation hereby ceded and relinquished and who is so entitled to reside thereon shall be entitled to select from said ceded portion Eighty acres of land which shall be allotted to such Indian in severalty. No restrictions as to locality shall be placed upon such selections other than that they shall be so located as to conform to the Congressional survey or sub-divisions of said tract or country, and any Indian having improvements may have the preference over any other person in and to the tract of land containing such improvements so far as they are within a legal sub-division not exceeding in area the quantity of land that he or she may be entitled to select and locate. All such allotments shall be made at the cost of the United States under such rules and regulations as The Secretary of the Interior may from time to time prescribe.

Article 3

All Indians residing in the lands hereby ceded and relinquished shall have the right if they so prefer under the direction of the Indian Agent to occupy and reside on such portions of the Colville Indian Reservation not hereby ceded as are not occupied by or in the possession of any other Indian or Indians.

Article 4

Whereas the lands used and occupied for School purposes at what is known as the Tonasket School on Buona-

parte Creek on said reservation have been ceded and relinquished to the United States, it is agreed and stipulated that in lieu thereof the United States will provide for a School site and school purposes a tract of land conveniently and desirably located upon the Colville Indian Reservation hereby ceded to contain Six Hundred and forty acres and upon the same at the cost of the United States, will erect suitable buildings for an Indian School and in all respects provide for the conduct, equipment and maintenance thereof as Indian Schools are now provided for, .. being expressly understood and agreed that no part of the purchase money hereinafter mentioned of the lands hereby ceded is to be employed or expended in the erection of school buildings or in the maintenance of Indian Schools upon said Reservation. And it is further stipulated that in lieu of the Saw Mill, Grist Mill and other Mill property hereby ceded, the United States will provide a suitable and convenient Mill Site and will thereon at its own cost erect suitable buildings and place all necessary fixtures.

Article 5

That in consideration of the cession surrender and relinquishment to the United States of all the title, claim, rights, estate and interest of said Indians in and to the tract of land above described, the United States will pay to the said Indians, the beneficiaries of this agreement, to be distributed per capita, the sum of One Million Five Hundred Thousand Dollars payable in five annual installments of Three Hundred Thousand Dollars each, with interest thereon at five per centum after this agreement shall take effect.

In all such payments each and every Indian aforesaid

over the age of Eighteen years shall receive and receipt for his or her share of said purchase money as the same becomes due and payable, and with respect to the share of each and every Indian aforesaid who shall be under Eighteen years of age, the same shall be invested under the direction of the Secretary of the Interior for the benefit of such Indians at a rate of interest not less than five per centum per annum, and the interest thereof with so much of the principal as may be deemed necessary and proper, shall be paid annually to the father of such Indian so entitled and under the age of Eighteen years, if living, and if such father be dead, then the same shall be paid to the mother, if living, and in the event the said mother be dead, then the same shall be paid to the Indian Agent of the Colville Reservation for the use and maintenance of such orphan, and when such minors shall attain their majority, their shares in such purchase money, or so much thereof as may remain unpaid, shall be paid over to them together with any interest that may be due thereon.

Article 6

It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limitations prescribed by law, to taxation for any purpose, national, state or municipal; that said Indians shall enjoy without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.

Article 7

It is agreed that the United States at its own cost, will erect on the Colville Indian Reservation not ceded at some point suitable and convenient to the Indians who may elect to remain upon the portion of the Reservation hereby ceded and have allotments set apart thereon as hereby stipulated, a blacksmith shop and furnish same with suitable tools and implements and employ a competent blacksmith for the benefit of said Indians.

Article 8

And whereas it is believed that many of the Indians above the age of Eighteen years residing and having their homes upon the said Colville Reservation are well advanced in industrial pursuits and economical training and possess habits so well formed as to warrant an early payment to such Indians of their shares in the purchase money of the lands hereby ceded and relinquished, it is therefore specially agreed and stipulated that the United States will pay in two equal annual installments with interest the shares of all such Indians above eighteen years of age in said purchase money who will furnish to The Secretary of the Interior a certificate in due form from the Indian Agent on said Colville Reservation to the effect that such Indian or Indians are of good character, of sober and industrious habits, and are suitable persons to entrust with the expenditure of money.

Article 9

It is stipulated and provided that such male adult Indians upon the Colville Reservation as do not on account of absence or for any other cause sign this agreement, shall upon receiving their shares in said purchase money, execute

and file with the Indian Agent on said Colville Reservation a brief relinquishment releasing to the United States all their right, title, interest and estate in and to the lands hereby ceded.

And it is further stipulated that in the event any of said Indians shall after reasonable notice given, fail, neglect, refuse or decline to receive and receipt for their shares in said purchase money, then and in all such cases under such rules and regulations as the Secretary of the Interior may prescribe, the share or shares of such Indians which are not claimed or called for, shall become common property of all Indians in said Reservation who conform to this agreement and they shall share and share alike therein.

Article 10

At the request of said Indians it is agreed and stipulated that the school site referred to in Article 4 of this agreement shall be located upon that portion of the lands hereby ceded which the Indians interested in said school may select. The Saw Mill and Grist Mill referred to in said Article 4 shall be located upon that part of said Reservation not ceded at such point as will be convenient to the Indians electing to remain on the ceded part of Reservation.

Article 11

That in further consideration of the said cession and relinquishment of the tract of land set forth and particularly described in this agreement, to the United States by said Indians and their Chiefs or head-men, and upon the understanding that said Chiefs and their people will faithfully perform this agreement, the United States in addition to the purchase money aforesaid will pay to Moses Chief of The Columbia Tribe of Indians the sum of One Thousand

Five Hundred Dollars in cash, to Joseph Chief of the Nez Perces tribe the sum of One Thousand dollars in cash, to Barnaby Chief of the Colville tribe the sum of one thousand Dollars in cash, to Antoine Chief of the Okanogan tribe the sum of one thousand Dollars in cash, and to Aripaughin Chief of the Lake tribe the sum of one thousand Dollars in cash, from and after the notification and approval of this agreement by Congress at which time the same will go into effect.

Article 12

This this agreement shall go into effect from and after its approval by Congress.

Witness our hands and seals the day and year first above written.

MARK A. FULLERTON, *Commissioner*
W. H. H. DUFUR, *Commissioner*
JAMES F. PAYNE, *Commissioner*

Antoine Chief Okanogans his X mark

• • •

[Balance of signatures, approximately 575 individuals, chiefs and sub-chiefs, is deleted.]

• • •

Signed, sealed and delivered in the presence of

HAL J. COLE
S. P. SHMIDT
E. C. THOMAS

I, Robert Flett, U.S. Indian Interpreter, for the Colville Indian Agency do hereby certify, on honor, that the foregoing agreement was carefully read and by me correctly interpreted and that the contents thereof were freely explained to, and fully understood by said Indians before the signing and sealing of the same.

Witness
A. M. ANDERSON /s/ ROBERT FLETT

APPENDIX G

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitutional Provisions:

United States Constitution, Art. I §8, cl. 3

> "The Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States and with the Indian Tribes;"

United States Constitution, Art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Executive Order:

Executive Order Dated July 2, 1872

EXECUTIVE MANSION
Washington, July 2, 1872

It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein named by Executive order of April 9, 1872, be restored to the public domain, and that in lieu thereof the country bounded on the east and south by the Columbia River on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

U.S. GRANT

Congressional Act:

Act of June 21, 1906 (34 Stat. 325)

To carry into effect the agreement bearing date May ninth, eighteen hundred and ninety-one, entered into between the Indians residing on the Colville Reservation and

commissioners appointed by the President of the United States under authority of the act of Congress approved August nineteenth, eighteen hundred and ninety, to negotiate with the Colville and other bands of Indians on said Colville Reservation for the cession of such portion of said reservation as said Indians might be willing to dispose of, there shall be set aside and held in the Treasury of the United States for the use and benefit of said Indians, which shall at all times be subject to the appropriation of Congress and payment to said Indians, in full payment for one million five hundred thousand acres of land opened to settlement by the act of Congress 'To provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes,' approved July first, eighteen hundred and ninety-two, the sum of one million five hundred thousand dollars, . . .

United States Statute:

25 U.S.C. §2 Duties of Commissioner

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

State Statutes

Revised Code of Washington

77.16.020 ***Taking during closed season—Exceeding bag limits—Taking within reserves.*** It shall be unlawful for any person to hunt, trap, or fish for any game birds, game animals, fur-bearing animals or game fish during the respective closed seasons therefor. It shall also be unlawful for any person to kill, take, or catch any species of game birds, game animals, furbearing animals, or game fish in excess of the number fixed as the bag limit. It shall also be unlawful for any person to hunt or trap for any game birds, game animals, or fur-bearing animals within the boundaries of any game reserve or closed area, and it shall likewise be unlawful for any person to fish for any game fish within any closed waters or within the boundaries of any game fish reserve.

Any person who hunts or traps any elk, moose, antelope, mountain goat, mountain shepp, caribou or deer in violation of this section is guilty of a gross misdemeanor and shall be punished by a fine or not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

Any person who hunts or traps any game bird in violation of this section is guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars or by imprisonment in the county jail for not less than ten days and not more than thirty days or by both such fine and imprisonment.

77.16.030 ***Possession during closed season or in excess of bag limits.*** It shall be unlawful for any person to have in his possession or under his control any game bird, nongame bird, game animal, fur-bearing animal, or game fish, or part thereof, during the closed season or in excess of the bag limit.

Any person who has in his possession or under his control any elk, moose, antelope, mountain goat, mountain sheep, caribou, deer, or parts thereof in violation of the foregoing portion of this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

Any person who has in his possession or under his control any game bird or part thereof in violation of the foregoing portion of this section is guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars or by imprisonment in the county jail for not less than ten days and not more than thirty days or by both such fine and imprisonment.

Provided, That any person who has lawfully acquired possession of any game bird, game animal, or game fish,

or part thereof, and who desires to retain it for human consumption or ornamental purposes, or desires to sell the skin, hide, horns, head, or plumage thereof, after the close of the season may do so in accordance with the rules and regulations of the commission.

Provided, further, That the owner of any game bird, nongame bird, game animal, fur-bearing animal, or game fish, who has lawfully propagated it or purchased from one who has so propagated it, may possess, ship, sell or otherwise dispose of such bird, animal or fish, when properly tagged or sealed.